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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/707,156
Filing Date: November 06, 2000
Appellant(s): SCHRAMM ET AL.

Michael R. Schramm
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 22, 2010 appealing from the Office action mailed April 22, 2010.

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(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 1-14 and 21-26 are pending and rejected.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

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(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

3,840,678	PRICE	10-1974
PRODUCT ALERT	3/23/1998, v28, n6 (FULL TEXT)	
1,428,356	HUNTER	(G. Britain) 3-1976
4,714,174	WILLIAMS	12-1987
5,246,046	SCHRAMM	9-1993
5,758,797	MARTINDALE	6-1998
4,869,390	KENNEDY	9-1989
1,485,581	BEUTLICH ET AL	(G. Britain) 9-1977
1,254,714	McCombs	1-1918
3,464,599	METH	9-1969
5,105,975	PATTERSON	4-1992
2,673,917	CORTEGGIANI ET AL	(France) 9-1992
11-227388	PILOT INK	(Japan) 8-1999
3,781,164	McCaffery	12-1973
PRODUCT ALERT	8/9/1999, v29, n15, part 1 (FULL TEXT)	
PRODUCT ALERT	8/9/1999, v29, n15, part 2 (FULL TEXT)	
WO 00/19803 BAKER	4-2000	
5,370,884	COLEMAN	12-1994
5,993,870	HOETING ET AL	11-1999
4,522,523	MANZONE	6-1985
2,917,766	CIFFO	12-1959
4,522,523	VOGELSANG	6-1985

CandyWarehouse www.candywarehouse.com/sourpunpop24.html

Reference labeled Exhibit A, photo labeled Felix Powder pop, no date

Reference labeled Exhibit B, photo labeled Felix Sour punker pop, no date

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Reference labeled Exhibit D, photo labeled Felix sour punker pop,

www.mexicoool.com/web/lucas/factory/punker.htm, 3/27/03

Reference labeled Exhibit F, photocopy of Lucas/Felix billing for punkerpops, 10/29/99

Reference labeled Exhibit G, photo labeled Lucas muecas, no date.

Appellant's Admitted Prior Art

English translations of both CORTEGGIANI and PILOT INK have been made of record.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

It is first noted that all of the rejections set forth in the Final Rejection mailed 4/22/10 are based on the fact that this currently appealed application has an effective filing date of 11/6/00. That is, the claims of the present application do not find support in any of appellants' previously filed applications, which are cited on page 2 of this pending application. This is because all of the claims in this application recite edible products, whereas none of the previously filed applications, disclosed on page 2 of this application, disclose edible products. Accordingly, Patent No. 5,246,046, patented 9/21/93, by one of the current appellants, is available prior art against the appealed claims.

112 Rejections

Claims 1-14 and 21-26 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement in that they present new matter.

The claims contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The various length/volume recitations in claims 1, 8, and 21 are new matter, not necessarily and inherently supported by the specification as originally filed. Specifically the recitation of "a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of the result of said container volume minus said funnel volume" as recited in claims 1 and 21, and "a volume within said container occupied by said edible particulate candy substance

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defines a volume that is no more than one half of the result of said container volume” as recited in claim 8 are not supported by the specification as originally filed. None of these spatial relationships are disclosed in words in the specification and it is not seen that the figures can be used to support spatial, including volumetric, relationships between elements.

The recitations of claim 21 relative to the gap/diameter of the handle/diameter of the candy article are new matter, not necessarily and inherently supported by the specification as originally filed. Specifically the recitation “wherein said funnel second open end and said candy article are adapted such that when said candy article is inserted within said container inner cavity a substantial gap is formed between said funnel second open end and said candy article”, “wherein the diameter of said candy article substantially exceeds the diameter of said handle”, “said gap and said difference in the size of said diameters of said candy article and said handle cooperate so as to provide for the flow of said edible particulate candy substance through said gap and around substantially the entire exterior of said candy article”. None of these spatial relationships are disclosed in words in the specification and it is not seen that the figures can be used to support spatial, including volumetric, relationships between elements. Not only is there no necessarily and inherent support for the phrases in question, the functional result would be affected by other factors such as the quantity of the particulate material and the quantity of the candy article, none of which is disclosed.

Prior Art Rejections

Claims 1-14 and 21-26 are rejected under 35USC103(a) as being unpatentable over Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A,B,D,F and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and Appellants' admission of the prior art, in view of Price (3,840,678), as further evidenced by Hunter (GB ('356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164) and further in view of Vogelsang (4,522,523) and Manzone (4,522,523).

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In regard to claim 1 and in regard to the rejection employing Product Alert (3/23/98) as the primary reference, Product Alert (3/28/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A,B,D,F and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870), and Appellants' admission of the prior art, teach it was conventional in the art to provide a flowable, particulate candy in a container and that inherently a flowable material is, of course, subject to spillage from the container, due to gravity. Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, parts 1 and 2), Baker, Coleman, Hoeting et al and Appellants' admission of the prior art, all teach that it was conventional to provide a container with flowable particulate candy. Therefore, Appellants are obviously not the first to provide a container with flowable candy, but like any other flowable material, the flowable candy would inherently (based on the law of gravity) be subject to spilling. See, e.g., in this regard, CandyWarehouse and Hoeting et al. Note that, although the picture is admittedly of poor quality, there is no question that CandyWarehouse shows a container containing a flowable candy powder that is lying on its side with the powder emanating therefrom and a separate cover with a hard candy attached to the cover as described in Product Alert (3/23/98). That is, Product Alert describes a container that has a powder candy in the container, a closure that seals the container, and both a handle on one side of the closure and a hard candy lollipop on the other side of the closure which extends down into the container when the lid is in place on the container, so that the lollipop picks up some of the candy powder and when the lid is removed from the container, the candy powder coated lollipop can be licked. This product, a candy powder in a container with a lid with an attached lollipop, sold by Lucas World since at least as early as 3/23/98, has been sold unchanged, except for different label names, since then, and is the product disclosed in Product Alert (3/23/98) and Product Alert (8/9/99), parts 1 and 2, as well as CandyWarehouse and the references labeled exhibits A,B,D,F and G. Although CandyWarehouse and the exhibits either have no date or have a date later than appellants' effective filing date (except for Exhibit F which has a billing date of 10/29/99), they are only being used to put a face, if you will, on the description of the product described in Product Alert (3/23/98). Although CandyWarehouse and the references labeled exhibits A,B,D,F and G are considered further evidence of the product described in Product Alert (3/23/98), the rejection is proper even without this additional evidence, and the rejection can rely

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on the applied references, Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99), parts 1 and 2, to teach that the recited structure of a candy powder in a container with an associated lid with attached lollipop that was capable of spilling, was prior art, conventional structure. Claim 1 differs from the combination in the provision of a funnel to inhibit spilling. As evidenced by Price, Price discloses that the function of the funnel in a container is to prevent spillage of a flowable food substance if the container is tilted, while at the same time allowing a second edible, solid product (22) access to the flowable food substance in the container, so that some of the flowable food substance can be associated with the second edible solid product which is removably insertable through the funnel. This is precisely Appellants' problem and solution; that is, employing a funnel to prevent the spillage of the contents therein, yet allowing a product or an article access to the contents. Hunter, Williams, Ciffo, Schramm, Martindale, Kennedy, Beutlich et al, McCombs, Meth, Patterson, Corteggiani, Pilot Ink and McCaffery are all relied on as further evidence that the art is replete with evidence that it was notoriously old in the art to provide a container with a funnel to solve the problem of preventing spillage from the container of either liquids or solids, and either edibles or inedibles, that are contained within the container. Note in this regard that the Court has noted in *In re Gorman* (18USPQ2d,1888), that "where teachings relied upon to show obviousness were repeated in a number of references, the conclusion of obviousness was strengthened". Note, for example, not only does Price teach a food in a funnel containing container to prevent spilling of the food, but so does Williams. To modify Product Alert (3/23/98) and provide a funnel for its art recognized and Appellants intended function, for a product inherently known to be spillable, would have been unequivocally obvious. It is noted that this is all that the references taken as a whole have to teach to reject claim 1 (i.e., a container, a funnel and a particulate candy). This is because claim 1 recites various contents of the container in the alternative, including, e.g., a particulate candy or a particulate candy and a candy article substance. Therefore, the references do not have to teach a "candy article substance" with or without a handle. The same reasoning applies, e.g., to claims 2 and 5 as well. That is, since the species of candy article substance is recited in the alternative in claim 1, its further narrowing in claim 2 only further defines the alternative species. In any case, note however, that the art taken as a whole does teach it would have been obvious to include a lollipop type product on a handle that is attachable to the container as taught by Product Alert

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(3/29/08). For example, in regard to claim 3, as evidenced by the art taken as a whole, the funnel would inherently inhibit spillage when the container is oriented in any position. In regard to claim 4, Appellants are not the first to associate a lollipop with a flowable candy in a container as evidenced by Product Alert (3/23/98) and the further evidentiary material. Product Alert (3/23/98) discloses a container containing a candy powder and a cap for the container, wherein the cap has a handle to which a lollipop is attached. The user pulls off the cap by its handle, licks the lollipop, and puts the lollipop attached to the cap, back in the container. In regard to claim 5, Product Alert (3/23/98), as further evidenced by the evidentiary material, teaches the association of a lollipop to a holder that is sealingly engagable with the container is well established in the art (e.g. "resealable containers"). Claims 1, 8 and 21 recite various dimensional relationships between the handle, plug and candy relative to their volumes. The particular dimensional/volumetric relationships between the various elements are seen to have been an obvious result effective variable, routinely determinable, and an obvious matter of choice. The art taken as a whole disclose various product containing container structures that include an anti-spill funnel as well as a dipable device to be inserted in the container to associate some of the contents of the container with the dipping device to remove a portion of the contents from the container, and wherein the dipping device is separate from or associated with a lid for the container. The containers of Ciffo, Price, Schramm ('046), McCombs, Corteggiani et al, Pilot Ink and Vogelsang all disclose container/contents/dipper device arrangements wherein the contents are capable of flowing around substantially the whole part of the dipper device one wishes to have the contents applied thereto. It is noted that the rejection is proper, and the references are all properly combinable because the references are all directed to either the problem of providing non-spillable containers and/or containers for dipping a dipper element into a container to associate the contents of the container with the dipper element to remove a portion of the contents from the container. It is also noted that Appellants disclosed method of associating the candy article with the particulate substance is by shaking the container. Claim 21 links the dimensional relationships with the functional capability that such relationships provide for the capability of the particulate material to "flow" around substantially the entire exterior of the candy article so as to enable the coating of substantially the entire exterior of the candy article. Thus, the claim links dimensional relationships to a capability of the container, via an

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intended use thereof. As discussed previously the particular dimensional/volumetric relationships between the various elements are seen to have been an obvious result effective variable, routinely determinable, and an obvious matter of choice. As noted above, these dimensional relationships are New Matter not necessarily and inherently supported by the application as originally filed. In any case, the art taken as a whole disclose various product containing container structures that include an anti-spill funnel as well as a dippable device to be inserted in the container to associate some of the contents of the container with the dipping device to remove a portion of the contents from the container, and wherein the dipping device is separate from or associated with a lid for the container. The containers of Ciffo, Price, Schramm ('046), McCombs, Corteggiani et al, Pilot Ink and Vogelsang all disclose container/contents/dipper device dimensional arrangements wherein the contents are capable of flowing around substantially the whole part of the dipper device that one wishes to have the contents applied thereto whether that flowing is the result of immersing the dipper device into the product or shaking the container and thus the dipper device and the contents of the container. The containers could, at any time, be capable of being shaken, and is a matter of intended use and thus how one applies the contents to the container is seen to have been an obvious matter of intended use. Note, too, that although Hoeting et al does not disclose a funnel, Hoeting et al unequivocally discloses that the container is dimensioned such that the container can be shaken to cause the contents to coat the candy (col. 6, para.2). The claims are directed to a container and not a method of using the container. It is also noted that Appellants only disclosed method of associating the candy article with the particulate substance is by shaking the container (page 7, para. 1). As for the recitation in claim 25 of the handle and plug/lid being adjustable, it is noted that the handle and lid structure of Ciffo, as further evidenced by Vogelsang and Manzone, would have been capable of being adjusted, at least to some degree, which is all the claims recite in this regard. In regard to claim 26, claim 26 recites that the container is capable of resembling some recognizable object. The art taken as a whole, including Baker, Ciffo and Appellants' admission of the prior art, discloses that it was, of course, notoriously conventional to provide containers with an ornamental/recognizable shape and the particular shape is seen to have been an obvious matter of design. Claim 26 also recites that the plug includes a stepped opening capable of allowing a pencil to be removably insertable into the plug. Product Alert (3/23/98), as further

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evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A,B,D,F and G, disclose a candy article connected to a plug for sealing the container but is silent as to a stepped opening for inserting an article such as a pencil therein. However, Coleman and Ciffo disclosure closures which have recesses for inserting and attaching articles thereto, and to modify the combination and employ a “stepped” recess to accommodate an article of choice would therefore have been obvious.

Claims 8-14 and 21-26 are rejected for the reasons given above.

Claims 1-14 and 21-26 are also rejected under 35 U.S.C. 103(a) as being unpatentable over Price (3,840,678), as further evidenced by Hunter (GB (‘356), Williams (‘174), Ciffo (2,917,766), Schramm (‘046), Martindale (‘797), Kennedy (‘390), Beutlich et al (GB ‘581), McCombs (‘714), Meth (‘599), Patterson (‘975), Corteggiani et al (FR’917), Pilot Ink (JP’388), and McCaffery (‘164), **in view of Product Alert (3/23/98),** as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A,B,D,F and G, Baker (WO 00/19803), Coleman (‘884), Hoeting et al (‘870), and Appellants’ admission of the prior art, **and further in view of Vogelsang (4,522,523) and Manzone (4,522,523).**

In regard to the rejection employing Price as the primary reference, and in regard to claim 1, Price discloses it was conventional to provide a container (10) for inhibiting the spillage of edible contents (20) of said container wherein the container defines an inner cavity and a funnel (14) extending into said inner cavity to provide communication between said cavity and the exterior of said container, and wherein said container removably contains a flowable, food substance. Price discloses that the function of the funnel is to prevent spillage of the flowable food substance if the container is tilted, while at the same time allowing a second edible, solid product (22) access to the flowable food substance in the container, so that some of the flowable food substance can be associated with the second edible solid product which is removably insertable through the funnel. This is precisely appellants’ problem and solution; that is, employing a funnel to prevent the spillage of the contents therein, yet allowing a product or an article access to the contents. Hunter, Williams, Ciffo, Schramm, Martindale, Kennedy, Beutlich et al, McCombs, Meth, Patterson, Corteggiani, Pilot Ink and McCaffery are all relied on as

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further evidence that the art is replete with evidence that it was notoriously old in the art to provide a container with a funnel to solve the problem of preventing spillage from the container of either liquids or solids, and either edibles or inedibles, that are contained within the container. Note in this regard that the Court has noted in *In re Gorman* (18USPQ2d,1888), that “where teachings relied upon to show obviousness were repeated in a number of references, the conclusion of obviousness was strengthened”. Note, for example, not only does Price teach a food in a funnel containing container to prevent spilling of the food, but so does Williams. Claim 1 differs from Price, in view of the art taken as a whole, in the particular contents of the container. Claim 1 recites some type of flowable, particulate candy. As noted above, the preponderance of the evidence, taken as a whole, fairly teaches that a funnel associated with a container can prevent the spillage of any flowable product capable of spilling out of a container, whether it is a solid or liquid, or edible or inedible. Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, parts 1 and 2), Baker, Coleman, Hoeting et al and Appellants’ admission of the prior art, all teach that it was conventional to provide a container with flowable candy. Therefore, Appellants are obviously not the first to provide a container with flowable candy, but like any other flowable material, the flowable candy would inherently (based on the law of gravity) be subject to spilling. See, in this regard, CandyWarehouse and Hoeting et al. Note that, although the picture is admittedly of poor quality, there is no question that CandyWarehouse shows a container containing a flowable candy powder that is lying on its side with the powder emanating therefrom and a separate cover with a hard candy attached to the cover as described in Product Alert (3/23/98). That is, Product Alert describes a container that has a powder candy in the container, a closure that seals the container, and both a handle on one side of the closure and a hard candy lollipop on the other side of the closure which extends down into the container when the lid is in place on the container, so that the lollipop picks up some of the candy powder and when the lid is removed from the container, the candy powder coated lollipop can be licked. This product, a candy powder in a container with a lid with an attached lollipop, sold by Lucas World since at least as early as 3/23/98, has been sold unchanged, except for different label names, since then, and is the product disclosed in Product Alert (3/23/98) and Product Alert (8/9/99), parts 1 and 2, as well as CandyWarehouse and the references labeled exhibits A,B,D,F and G. Although CandyWarehouse and the exhibits either have no date or have

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a date later than appellants' effective filing date (except for Exhibit F which has a billing date of 10/29/99), they are only being used to put a face, if you will, on the description of the product described in Product Alert (3/23/98). Although CandyWarehouse and the references labeled exhibits A,B,D,F and G are considered further evidence of the product described in Product Alert (3/23/98), the rejection is proper even without this additional evidence, and the rejection can rely on the applied references, Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99), parts 1 and 2, to teach that the recited structure of a candy powder in a container with an associated lid with attached lollipop that was capable of spilling, was prior art, conventional structure. To therefore modify Price in view of the art taken as a whole and substitute one conventional spillable, material for another conventional spillable, material, and one that is edible as well, in a container specifically designed to prevent spilling, and allow an edible to be dipped into a second edible contained in the container, is seen to have been obvious in view of the art taken as a whole. In regard to claim 3, as evidenced by the art taken as a whole, the funnel would inherently inhibit spillage when the container is oriented in any position. In regard to claim 4, the claim differs from Price in the recitation of a lollipop within the container. It is noted, in this regard, that appellants are not the first to associate a second dippable edible with a first edible that is contained within a funnel containing container as evidenced by Price.

However, appellants are also not the first to associate a lollipop with a flowable candy in a container as evidenced by Product Alert (3/23/98) and the further evidentiary material. Product Alert (3/23/98) discloses a container containing a candy powder and a cap for the container, wherein the cap has a handle to which a lollipop is attached. The user pulls off the cap by its handle, licks the lollipop, and puts the lollipop attached to the cap, back in the container. To modify the combination and add the appropriate second edible that is compatible with the first edible (in this case, a lollipop with a flowable candy) for its art recognized and Appellants intended function of providing a container that does not spill the contents but allows access by the second edible to the container contents would therefore have been obvious. In regard to claim 5, Product Alert (3/23/98), as further evidenced by the evidentiary material, teaches the association of a lollipop to a holder that is sealingly engagable with the container is well established in the art (e.g. "resealable containers") and to modify the combination and provide the container with an engagable holder for its art recognized and Appellants intended function would

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therefore have been obvious. Claims 1, 8 and 21 recite various dimensional relationships between the handle, plug and candy relative to their volumes. The particular dimensional/volumetric relationships between the various elements are seen to have been an obvious result effective variable, routinely determinable, and an obvious matter of choice. The art taken as a whole disclose various product containing container structures that include an anti-spill funnel as well as a dippable device to be inserted in the container to associate some of the contents of the container with the dipping device to remove a portion of the contents from the container, and wherein the dipping device is separate from or associated with a lid for the container. The containers of Ciffo, Price, Schramm ('046), McCombs, Corteggiani et al, Pilot Ink and Vogelsang all disclose container/contents/dipper device arrangements wherein the contents are capable of flowing around substantially the whole part of the dipper device one wishes to have the contents applied thereto. It is noted that the rejection is proper, and the references are all properly combinable because the references are all directed to either the problem of providing non-spillable containers and/or containers for dipping a dipper element into a container to associate the contents of the container with the dipper element to remove a portion of the contents from the container. It is also noted that Appellants disclosed method of associating the candy article with the particulate substance is by shaking the container. Claim 21 links the dimensional relationships with the functional capability that such relationships provide for the capability of the particulate material to "flow" around substantially the entire exterior of the candy article so as to enable the coating of substantially the entire exterior of the candy article. Thus, the claim links dimensional relationships to a capability of the container, via an intended use thereof. As discussed previously the particular dimensional/volumetric relationships between the various elements are seen to have been an obvious result effective variable, routinely determinable, and an obvious matter of choice. As noted above, these dimensional relationships are New Matter not necessarily and inherently supported by the application as originally filed. In any case, the art taken as a whole disclose various product containing container structures that include an anti-spill funnel as well as a dippable device to be inserted in the container to associate some of the contents of the container with the dipping device to remove a portion of the contents from the container, and wherein the dipping device is separate from or associated with a lid for the container. The containers of Ciffo, Price, Schramm ('046),

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McCombs, Corteggiani et al, Pilot Ink and Vogelsang all disclose container/contents/dipper device dimensional arrangements wherein the contents are capable of flowing around substantially the whole part of the dipper device that one wishes to have the contents applied thereto whether that flowing is the result of immersing the dipper device into the product or shaking the container and thus the dipper device and the contents of the container. The containers could, at any time, be capable of being shaken, and is a matter of intended use and thus how one applies the contents to the container is seen to have been an obvious matter of intended use. Note, too, that although Hoeting et al does not disclose a funnel, Hoeting et al unequivocally discloses that the container is dimensioned such that the container can be shaken to cause the contents to coat the candy (col. 6, para.2). The claims are directed to a container and not a method of using the container. It is also noted that Appellants only disclosed method of associating the candy article with the particulate substance is by shaking the container (page 7, para. 1). As for the recitation in claim 25 of the handle and plug/lid being adjustable, it is noted that the handle and lid structure of Ciffo, as further evidenced by Vogelsang and Manzone, would have been capable of being adjusted, at least to some degree, which is all the claims recite in this regard. In regard to claim 26, claim 26 recites that the container is capable of resembling some recognizable object. The art taken as a whole, including Baker, Ciffo and Appellants' admission of the prior art, discloses that it was, of course, notoriously conventional to provide containers with an ornamental/recognizable shape and the particular shape is seen to have been an obvious matter of design. Claim 26 also recites that the plug includes a stepped opening capable of allowing a pencil to be removably insertable into the plug. Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A,B,D,F and G, disclose a candy article connected to a plug for sealing the container but is silent as to a stepped opening for inserting an article such as a pencil therein. However, Coleman and Ciffo disclosure closures which have recesses for inserting and attaching articles thereto, and to modify the combination and employ a "stepped" recess to accommodate an article of choice would therefore have been obvious.

Claims 8-14 and 21-26 are rejected for the reasons given above.

(10) Response to Argument

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Appellant's arguments filed in the brief have been considered but are not persuasive.

Specifically regarding appellant's arguments in regards to the 112 rejection, appellant's arguments are not convincing. Appellant argues that length and volume relationships are supported through (a) the drawings of the specification and (b) with the statement in the abstract that the product is filled to no more than a predetermined amount. Additionally, appellant argues that the structural relationships are inherently required for the invention to properly function and that there is support for repositioning the container.

Appellant's arguments are not convincing as:

- It is noted that the claims recite specific spatial features;
- None of the spatial relationships are disclosed in words in the specification and it is not seen that the figures can be used to support spatial, including volumetric, relationships between elements;
- A statement that the product can be filled to a *predetermined level* is not support for the *fill volume*, let alone, a specific fill volume which is no more than one half of the resultant volume of the container;
- It is not seen how the functioning of the product inherently supports specific spatial features and there is no evidence to support Appellant's argument that the features are inherent, showing that the product would or would not inherently work with different spatial features; and
- Repositioning of the container is not a rejected limitation.

Specifically regarding appellant's argument that the references do not teach of the instantly claimed limitations, Appellant's arguments are not convincing. Appellant's make the broad statement that the claim limitations are not taught by the prior art but fail to point out any reasons why appellant's believe this; Appellant's arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

Also, the Board of Appeals has already affirmed the decision that the structural elements listed, are not patentable.

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(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Kelly Bekker

/Kelly Bekker/

Conferees:

/Keith D. Hendricks/

Supervisory Patent Examiner, Art Unit 1781

/Christine Tierney/

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